No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO GRANBERRY,

Petitioner,

v.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I

THE ONLY ISSUE RAISED IN THIS CASE IS THE EX POST FACTO APPLICATION OF THE ILLINOIS STATUTE TO PETITIONER'S CASE.

Respondent contends that the instant petition included a due process claim which was not exhausted in the state courts of Illinois. Thus, it is argued (Respondent's Brief, p. 20) the instant petition at best included both exhausted and unexhausted claims and should have been dismissed as a mixed petition under the rule of *Rose* v. *Lundy*, 455 U.S. 509 (1982).

As is clearly seen from a review of the *pro se* Petition for Writ of Habeas Corpus (J.A. 6), the only due process claim raised was that required to incorporate the *ex post facto* issue under the fourteenth amendment to the United States Constitution. Moreover, no separate due process issue was decided by the District Court; raised by Petitioner in the Court of Appeals; decided by the Seventh Circuit; raised in the certiorari petition; nor mentioned in Petitioner's Brief in Chief in this Court. Clearly, had there been an additional due process claim it would surely be considered abandoned at this point. If not, Petitioner now explicitly abandons any claim other than the *ex post facto* issue.

Respondent also argues (Brief, pp. 7, 15) that the constitutionality of a state statute is at issue in this case. This is not an accurate characterization of the question raised in the habeas corpus petition or before this Court. At most, Petitioner contends that the statute is unconstitutional as applied to his case. He certainly advances no attack upon the facial validity of the statute nor the Illinois General Assembly's right to adopt or modify parole release criteria.

The only substantive issue raised in the habeas corpus petition was whether the Illinois statute was an *ex post facto* law as applied to this Petitioner.

II

IT IS INAPPROPRIATE FOR A FEDERAL COURT TO CONSIDER NONEXHAUSTION OF STATE COURT REMEDIES WHEN THAT ISSUE WAS NOT TIMELY RAISED BY THE STATE ATTORNEY GENERAL.

A. Respondent has too Narrowly Construed the Purpose of Exhaustion under Section 2254.

Respondent begins his analysis of the exhaustion question by asserting that there are only two exceptions recognized by this Court to the usual rule that a prisoner must exhaust the available state court remedies before filing a petition under 28 U.S.C. § 2254 (Respondent's Brief, p. 6). The two exceptions identified by Respondent are (1) futility and (2) "exceptional circumstances." Petitioner submits that Respondent's analysis of the decisions of this Court is seriously flawed.

The doctrine of futility stands on a manifestly different footing than the other situations in which this Court has not required exhaustion. The concept of futility is really the application of the explicit exception to the exhaustion requirement specified by Congress in 28 U.S.C. § 2254(b). This section of the statute requires exhaustion of state court remedies unless:

> . . . there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

When a federal court finds that pursuit of a state remedy would be futile, it is really determining that the statutory

exception has been met and that the state corrective process does not provide an effective remedy for the prisoner, *see*, *Snethen* v. *Nix*, 736 F.2d 1241, 1245 (8th Cir. 1984); *Galtieri* v. *Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978). This is quite different than the "exceptional circumstances" situation in which there is an available state court remedy, but the prisoner is relieved of the obligation to pursue such process in state court prior to filing his federal petition.

Respondent reads the decisions of this Court defining those "exceptional circumstances" as being limited to cases of great urgency requiring prompt disposition (Respondent's Brief, p. 7). Petitioner submits that this is not a correct analysis of the issue as originally recognized by this Court in *Ex parte Royall*, 117 U.S. 241 (1886). In *Royall* the Court was faced with a habeas corpus petitioner who sought federal habeas corpus *prior to his state trial*. The lower federal court dismissed for lack of jurisdiction. On appeal, this Court determined that the lower court had jurisdiction to hear the case, but that the federal court was "not bound in every case to exercise such power immediately upon application being made for the writ." The Court further concluded that the lower federal court has the "discretion as to the time and mode in which it will exert the powers conferred upon it," 117 U.S. at 251. This Court affirmed the circuit court, finding no abuse of discretion in denying the writ before trial.

In *Royall* this Court decided that ordinarily federal courts have discretion not to intervene in advance of a state criminal trial, "that discretion, however, to be subordinated to any special circumstances requiring immediate action," 117 U.S. at 253. Thus *Royall* clearly stands for the proposition that the federal courts have the discretion to intervene prior to trial, but that the courts must grant

relief if "special circumstances" are found. Although later cases expanded the concept of exhaustion, the fact remains that federal courts have broad discretion to consider habeas corpus petitions prior to exhaustion of state remedies, Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 Ohio St. L.Rev. 393, 405 (1983) (hereinafter cited as "Yackle"). Here Respondent seeks to convert the discretionary rules regarding exhaustion into rigid restrictions which have the same application and impact as jurisdictional prohibitions. Such an assertion is contrary to the established precedent of this Court.

In *Frisbie* v. *Collins*, 342 U.S. 519 (1952) this Court explicitly rejected the precise contention advanced by Respondent in the case at bar. In *Frisbie* the State of Michigan argued that exhaustion of state court remedies was required in all cases except those of great urgency, *Brief for Petitioner* at 27, *Frisbie* v. *Collins*, 342 U.S. 519 (1952). Justice Black, speaking for the Court, rejected such a narrow view of "special circumstances," finding that such circumstances are to be evaluated on a case by case basis, with the district court granted discretion to determine when exhaustion should not be required:

> Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts, subject to appropriate review by the courts of appeal.
>
> . . . The Court of Appeals did expressly consider the question of exhaustion of state remedies. It found the existence of "special circumstances" which required prompt federal intervention "in this case." It would serve no useful purpose to review those special circumstances in detail. They are peculiar to this case, may never come up again, and a discussion of them could not give precision to the "special circumstances" rule. It is sufficient to say that there are sound arguments to support the Court of Appeals' conclusion that prompt decision of the issues raised was desirable. We accept its findings in this respect. 342 U.S. at 521-522.

Indeed, in *Frisbie* one of the factors which lead to this Court to reach the merits of Collins' claim was that the nonexhaustion issue was not raised in the district court, although it was raised in both the Court of Appeals and Supreme Court, 342 U.S. at 521, n. 6, *see also*, *Collins* v. *Frisbie*, 189 F.2d 464 (6th Cir. 1951).

The decisions of this Court do not support the rigid analysis suggested by Respondent. Rather, the decisions of this Court stand for the proposition that a lower federal court may entertain a state prisoner's petition without requiring exhaustion when the unique circumstances of the case require. Here the district court considered the merits of the petition when the state failed to raise a nonexhaustion claim. These circumstances are sufficient, at the very least, to vest discretion in the district court to consider the merits of the case as an "exceptional circumstance" within the meaning of *Royall*. As Professor Yackle concluded:

> The federal habeas courts should not be concerned with exhaustion if the states' own representatives do not raise and insist upon it. If counsel for the respondent fails to assert an exhaustion argument in a proper and timely fashion, that procedural default warrants the normal sanction—forfeiture of any later opportunity to raise it. If counsel concedes that state court remedies have been exhausted or waives the matter, the federal courts should again be unconcerned. There is no greater justification for raising the exhaustion question sua sponte in habeas than in any other context. *Yackle*, at 442 (footnotes omitted).

B. The State Judicial System has No Interest in Litigation which was Never Filed in State Court.

The second primary contention of Respondent is that the state courts of Illinois have an interest in this litigation which is separate and apart from that of the parties to the law suit (Respondent's Brief, pp. 14-15). This perplexing argument is made even more difficult to comprehend by the Illinois Attorney General's assertion that the "judiciary" is also his client. Respondent argues at page 15 of his Brief that the Illinois Attorney General has an obligation to protect the interests of the Illinois judiciary which apparently transcend his representation of the Warden in this case.

Petitioner knows of no authority to suggest that a state judicial system acquires an interest in litigation never filed in state court. Here Petitioner does not complain about his conviction in state court, but raises an issue relating to parole—a question Respondent argues has never been properly advanced in state court. While Petitioner doubts the validity of such a contention as applied to a 2254 petition which attacks a state court conviction, such a position seems particularly inappropriate when applied to a 2254 case which relates to a matter of parole.

Secondly, if the Illinois Attorney General is, indeed, the attorney for the entire state judiciary, as well as the Warden, it would seem incumbent upon counsel to advise the district court of the state's position in a timely manner and not leave to the federal courts the obligation to divine the state's position. If the Attorney General is the attorney for the judiciary, one would assume that he considered the interest of all of his clients before filing a motion in the district court to dismiss this action for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

Thirdly, the Attorney General did more than simply ignore or forget to raise an exhaustion claim. He explicitly asked the district court to resolve the merits of the case. Nowhere in his Brief does Respondent deny that under the usual rules of federal practice and procedure his 12(b)(6) motion acted as a forfeiture of the exhaustion question.

Finally, Respondent's argument is foreclosed by this Court's decision in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977). Certainly if Respondent's argument here was at all viable, the Court in *Hodory* should have declined to allow the federal courts to consider the case, finding that the state judiciary had an interest not adequately advanced by the Ohio Attorney General. Moreover, unlike the case at bar, *Hodory* involved the facial validity of a state statute which had not been construed by the state courts. Here, the facial validity of a statute is not involved, and the Illinois Appellate Court has already considered, and rejected, the precise issue. Respondent's effort (Respondent's Brief, p. 14) to distinguish *Hodory* is simply inadequate, particularly since no ongoing criminal prosecution is involved here.

The position advanced by Respondent is illogical, impractical, contrary to the usual rules of practice and procedure, and directly in conflict with the decisions of this Court. The state should be found to have forfeited any exhaustion issue in this case.

III

PETITIONER HAS EXHAUSTED STATE COURT REMEDIES, AND, IN ANY EVENT, FURTHER RECOURSE TO THE STATE COURTS OF ILLINOIS WOULD BE FUTILE.

A. Petitioner has Exhausted his State Court Remedies.

Without reference to the specific procedural posture of this case or the manner in which the Illinois appellate

courts have dealt with the *ex post facto* issue, Respondent argues that the Illinois Supreme Court's denials of Petitioner's motions for leave to file a petition for a writ of mandamus does not amount to an adjudication on the merits. Although Petitioner has shown (Brief-in-Chief, p. 29) that the Illinois Supreme Court's decision is presumed to be on the merits, he asserts, that all he is required to do is give the Illinois courts a fair opportunity to consider his claim; there is no requirement that the court address the merits of the issue, *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978).

Unlike *Picard* v. *Connor*, 404 U.S. 270 (1971), here the precise issue was raised in state court. Unlike *Pitchess* v. *Davis*, 421 U.S. 482, 488 (1975), here the correct remedy was pursued. More importantly, this is an issue which can only be decided by the Illinois Supreme Court. As will be made clear in the final section of this Brief, only the state's highest court is in a position to grant Petitioner relief.

It is true that Petitioner could file an action in the Circuit Court of Johnson County, Illinois. That court, however, would be required to deny relief based on the Appellate Court's decision in *Harris* v. *Irving*, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980). The Fifth District of the Appellate Court, for reasons detailed in the final section of this Brief, would follow *Harris* and deny relief. Petitioner would then be left to seek discretionary review in the Illinois Supreme Court.

Respondent's argument in this Court is reminiscent of Justice Rutledge's description of the Illinois post conviction procedure as a "merry-go-round," *Marino* v. *Ragen*, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring). While Illinois has improved its procedures in the past forty years, the position asserted here is essentially that this

prisoner should be required to return to state court and pursue *pro se* a writ of mandamus which will certainly be denied, so that two or three years from now he can file a new federal habeas corpus petition. Whatever the merits of the general assertion of law cited by Respondent, Petitioner has fairly presented his claim to the Illinois courts and should be deemed to have exhausted his state court remedies.

B. It would be Futile to Require Petitioner to Litigate this Issue in State Court.

Respondent concludes his Brief by arguing that since both the Illinois Appellate Court and the United States Court of Appeals have denied relief on the *ex post facto* question "[i]f petitioner does indeed have a convincing *ex post facto* argument, that argument should be as convincing in the Appellate Court of Illinois, Fifth District, as it could be in the United States Court of Appeals for the Seventh District," (Respondent's Brief, p. 22). This contention fails entirely to consider the manner in which the two courts decided the *ex post facto* issue.

In *Harris* v. *Irving*, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980) the Illinois Appellate Court denied relief finding that a statute which only modified parole eligibility could not under any circumstances raise an *ex post facto* claim. The Court distinguished statutes from other jurisdictions and simply stated that the issue had no merit. There has been no change in Illinois law since 1980, and the personnel on the Fifth District of the Illinois Appellate Court are precisely the same today as when *Harris* was decided. Thus recourse to state court would be futile for Petitioner. If the judges on the Fifth District of the Illinois Appellate Court were inclined to reconsider the issue, they would still be faced with the decision of the

Court of Appeals in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. denied*, 469 U.S. 842 (1984) which makes a change in the state court's decision even less likely.

The rejection of the *ex post facto* claim in *Heirens* was based on a *factual* determination "that the 1972 Illinois legislation delineating the parole criteria to be considered subsequent to January 1, 1973, did not enact a change in the factors the Parole Board used in making its parole determinations, rather it merely codified the Board's prior practice and procedure," 729 F.2d at 463. Unlike the state court, the Seventh Circuit found that a statute which changed parole eligibility in a manner "disadvantageous to the offender" would operate as an *ex post facto* law, 729 F.2d at 459. This factual conclusion was reached, not on the basis of evidence presented in the district court, but by the Court of Appeals taking judicial notice of a magazine article written by a current member of the Illinois Parole Board, 729 F.2d at 459, n. 6, 460.

In the Seventh Circuit Petitioner argued that the factual conclusion reached in *Heirens* was incorrect. Moreover, this would certainly seem a matter which requires factual development through the presentation of evidence and is not an appropriate issue for either judicial notice nor recourse to magazine articles.

Thus the issue has been decided by the state court in a manner which forecloses a viable attack. The Seventh Circuit, however, decided the case on a factual basis without an adequate record in a manner Petitioner believes is subject to serious question.

The Court of Appeals was correct in *Welsh* v. *Mizell*, 668 F.2d 328, 329 (7th Cir. 1982), *cert. denied*, 459 U.S. 923 (1982) that further litigation of this claim in state court would be futile.

CONCLUSION

For the reasons specified in his briefs, Petitioner respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand this cause with directions to consider the merits of the petition.

Respectfully submitted,

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